Postal Regulatory Commission Submitted 8/30/2012 4:09:33 PM Filing ID: 85066 Accepted 8/30/2012 ORDER NO. 1455

UNITED STATES OF AMERICA POSTAL REGULATORY COMMISSION WASHINGTON, DC 20268-0001

Before Commissioners: Ruth Y. Goldway, Chairman;

Nanci E. Langley, Vice Chairman;

Mark Acton;

Tony Hammond; and

Robert G. Taub

Valassis NSA Docket No. MC2012-14

Valassis NSA Docket No. R2012-8

ORDER DENYING NEWSPAPER ASSOCIATION OF AMERICA MOTION FOR STAY

(August 30, 2012)

I. INTRODUCTION

The Newspaper Association of America (NAA) filed a motion seeking to stay the effect of Order No. 1448, which approved the addition of the Valassis Direct Mail Inc. Negotiated Service Agreement (NSA) to the market dominant product list. For the reasons discussed below, the Motion is denied.

¹ Newspaper Association of America Motion for Stay, August 24, 2012 (Motion). NAA erroneously filed its Motion under obsolete rule 66, which was repealed in 2009. See Docket No. RM2009-4, Order No. 214, Order Eliminating Obsolete Rules of Practice, May 18, 2009, at 3-4. As the Postal Service points out, that rule "was never intended to apply, in effect, to suspend the effectiveness of a final Commission Order or Recommended Decision disposing of a proceeding." Postal Service Answer, *infra*, at 2. The Commission nevertheless accepts NAA's filing, as it would be permissible under rule 21.

II. BACKGROUND

On August 23, 2012, the Commission issued Order No. 1448 in Docket Nos. MC2012-14 and R2012-8. The Valassis NSA is a contract providing discounted prices (in the form of rebates) for the distribution of advertising circulars. In Order No. 1448, the Commission found that the Valassis NSA satisfied the relevant statutory requirements for approval of a market dominant NSA. This included findings that the NSA (1) would improve the net financial position of the Postal Service as required by 39 U.S.C. 3622(c)(10)(A)(i); (2) would not cause unreasonable harm to the marketplace as required by 39 U.S.C. 3622(c)(10)(B); (3) was not unduly discriminatory among mailers in violation of 39 U.S.C. 403(c); and (4) that terms of the NSA were reasonable and available to similarly situated mailers pursuant to 39 U.S.C. 3622(c)(10). The NSA became effective upon its approval by the Commission.

On August 24, 2012, NAA filed its Motion. In Order No. 1450, the Commission, directed that answers to the Motion be submitted by 1:00 p.m. Tuesday, August 28, 2012.² Answers were submitted by the National Newspaper Association,³ the Public Representative,⁴ and the Postal Service.⁵

III. NAA's MOTION

NAA seeks a stay of Order No. 1448 pending resolution of its petition for review filed in the United States Court of Appeals for the District of Columbia Circuit. ⁶ See Newspaper Association of America v. Postal Regulatory Commission, No. 12-1367

² Order Shortening Time for Response, August 27, 2012 (Order No. 1450).

³ Support of National Newspaper Association for Newspaper Association of America Motion for Stay, August 28, 2012 (NNA Answer).

⁴ Public Representative Response to Order No. 1450, August 28, 2012 (PR Answer).

⁵ United States Postal Service Answer in Opposition to Newspaper Association of America's Motion to Stay, August 28, 2012 (Postal Service Answer).

⁶ Motion at 1; see also id. at 4 (requesting the Commission to stay "the effect of Order No. 1448 pending resolution" of its petition for review).

(D.C. Cir.) (*NAA v. PRC*). ⁷ It argues that if a stay is not granted, there is a strong likelihood that NAA's members will be irreparably harmed within 90 days because they would be unable to take advantage of the discounted rates granted only to Valassis by the Order. *Id.* at 4. NAA claims that although the Order anticipates that the NSA will grant discounts in only a limited number of markets, nothing in the NSA limits the availability of the discounts. *Id.* It proposes that factors recently used by the Commission in another proceeding⁸ form the appropriate standard of review here, namely, (1) NAA has a substantial likelihood of success on the merits; (2) NAA would suffer irreparable harm if the preliminary injunction is not granted; (3) the balance of equities favor issuing an injunction; and (4) the issuance of an injunction is in the public interest. *Id.* at 2.

IV. ANSWERS

NNA and the Public Representative submitted statements in support of the Motion. Both argue that the Commission's analysis in Order No. 1448 is flawed. NNA contends that the Commission incorrectly performed an "antitrust-type analysis" to determine the relevant marketplace and did not adequately conceptualize harm within a marketplace. NNA Answer at 1-3.

The Public Representative argues that the Commission misapplies antitrust principles in a "result-oriented way" (PR Answer at 1); that the NSA prices are available to only one entity and will skew the market (*id.* at 5-6); and that the market should now be defined as "the weekend delivery of FSI [free standing insert] packets inside newspapers." *Id.* at 7.

⁷ NAA also contemporaneously filed a motion for stay in *NAA v. PRC. See* Petitioner's Emergency Motion for a Stay Pending Judicial Review, August 24, 2012 (Emergency Motion).

⁸ See Order No. 1387, Docket No. C2012-2, Order Denying American Postal Workers Union, AFL-CIO, Motion for an Emergency Order, June 29, 2012 (APWU Order).

The Postal Service opposes NAA's Motion. It argues that the Motion suggests an incorrect standard for review, and that the preliminary injunction standard advocated by NAA is inapplicable because NAA is analogous to a party seeking reconsideration after a court has already issued an order resolving an underlying complaint. Postal Service Answer at 3. It asserts that a suspension of a final determination issued in connection with proceedings under 39 U.S.C. §§ 3622 and 3642 would be unprecedented and is not authorized by any Commission rule or procedure. *Id.* at 4. It also claims that, even under the preliminary injunction standards, NAA has not met the burden of proof warranting injunctive relief. *Id.* at 7-14.

V. COMMISSION ANALYSIS

NAA suggests that its Motion be reviewed pursuant to factors routinely used to evaluate requests for a preliminary injunction. *See Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (1958); *Canales v. Paulson*, 2006 WL 2520611, *3 (D.D.C. 2006). These factors do not appear to be applicable here because Order No. 1448 is a final Commission order. ⁹ Use of those factors in the APWU Order was appropriate because APWU sought to enjoin the Postal Service from implementing proposed changes in service for First-Class Mail, Periodicals, and Standard Mail as well as other operational changes until the Commission issued its advisory opinion in Docket No. N2012-1. APWU Order at 1-2. In contrast, in the instant proceeding, NAA essentially seeks to enjoin a contract between the Postal Service and Valassis.

Nonetheless, the Motion may be considered pursuant to 5 U.S.C. § 705, which, in pertinent part, provides: "When an agency finds that justice so requires, it may

⁹ The Postal Service argues that these factors are inapplicable and characterizes the Motion as "essentially a request for reconsideration." Postal Service Answer at 1, 2-7.

postpone the effective date of action taken by it, pending judicial review." The Postal Service does not discuss section 705.

In considering whether "justice so requires," the Commission will balance the interests of the party seeking the stay with the overall public interest, including the interests of the parties to the contract, and the likelihood the requesting party will sustain unreasonable harm in the absence of a stay.

NAA's claim of irreparable harm is not persuasive. It presents no new evidence to bolster this claim. Instead, it merely refers to "harms demonstrated in the record of this proceeding by the unprecedented number of declarations and affidavits submitted by newspapers from across the nation, both large and small businesses." Motion at 3.

The Commission carefully considered and rejected the newspapers' assertions that the NSA would cause unreasonable harm to the marketplace. See Order No. 1448 at 26-33. The Commission determined that the market for the distribution of advertising circulars is competitive; that the NSA would provide a net financial benefit to the Postal Service; that it would not cause unreasonable harm to the marketplace; and that it would be available on reasonable terms to similarly situated mailers. Ultimately, the Commission found that the NSA is in the public interest because it protects competition and benefits consumers, in this context, national retailers advertising durable and semi-durable goods. *Id.* at 26. Thus, on balance, the public interest outweighs NAA's more narrow interests.

NAA's claim of irreparable harm, like the newspapers' general contention of unreasonable harm to the marketplace, remains unpersuasive. Although no new evidence was filed in this matter, in its contemporaneously filed Emergency Motion, NAA refers to "detailed survey data demonstrating that newspaper companies stand to lose about \$1 billion in advertising revenues, out of a category of \$2.5 billion (resulting in an approximately 40 percent decrease in business), if the Valassis NSA becomes

¹⁰ See also 39 U.S.C. § 503, which authorizes the Commission to "take any other action [it] deems necessary and proper to carry out [its] functions and obligations" under title 39.

effective." Emergency Motion at 9. This claim cannot be reconciled with the limited reach of the NSA.

The NSA is for 3 years. For the entire 3 years, the Postal Service estimates that gross postage revenues under the NSA will total only \$107 million. In the first year, estimated weekly NSA volumes range from a low of 217,000 to about 1.1 million pieces. This equates with service to one moderate-size metropolitan area. In terms of weekly revenues, the volumes translate between \$37,000 and \$186,000, respectively. Appellate review is likely to take about 1 year. First year NSA revenues cannot reasonably be characterized as causing the newspaper industry unreasonable harm. Even in the third year, when Valassis projects the NSA will be operating in 11 markets, weekly revenues under the NSA are estimated to range between \$308,500 and \$750,000. *Id.* Total gross postage revenue in year 3 of the contract is estimated to be at most \$51.8 million. In short, the claim that newspapers "stand to lose about \$1 billion" lacks proportion and is not plausible.

NAA's hypothetical loss is based on the unrealistic assumption that all current newspaper revenue for advertising that might be eligible for inclusion under the Valassis NSA will disappear. While it is certainly possible that some newspapers could lose some of their advertising business to a new market entrant in this competitive market, NAA makes it clear that if the NSA goes into effect, the newspaper industry will take steps to protect its business. This makes NAA's scenario even more implausible. It is inconceivable that all of the newspapers' current advertisers that are eligible for inclusion in the Valassis NSA will immediately cease to use newspapers to distribute FSIs.

¹¹ Notice of the United States Postal Service of Filing of Contract and Supporting Data and Request to Add Valassis Direct Mail, Inc. Negotiated Service Agreement to the Market-Dominant Product List, April 30, 2012, Attachment F, tab: Discount_Rebate.

¹² Response, United States Postal Service to Notice of Inquiry No. 1, June 29, 2012, at 4.

¹³ Newspaper Association of America Response to Notice of Inquiry No. 1, June 29, 2012, at 10.

If some newspapers have to adjust their advertising rates (and/or attempt to negotiate lower private carrier distribution rates) this is not unreasonable harm. It is a consequence of fair competition. NAA has not made a satisfactory showing that it will sustain unreasonable harm under the NSA.

In summary, NAA has failed to demonstrate that the interests of justice require the Commission to grant a stay of its Order pending appeal. As a result, its Motion for Stay is denied.

VI. ADDITIONAL MATTERS

The Public Representative's answer, while largely unrelated to the Motion, merits analysis given the sweeping nature of his claims. The Public Representative argues that as a result of the NSA, retailers will be able to have Valassis deliver FSIs for \$20 per thousand while it will cost the retailer \$45 per thousand to have a newspaper deliver its FSIs. PR Answer at 2. This argument exhibits a lack of understanding of the market, as set out in the record. Currently, none of the FSIs that will be eligible for delivery through the Valassis NSA is sent as saturation mail. Newspapers deliver these FSIs in the Sunday (or Saturday) newspaper at a price not identified in this case. They do not mail them now, and there is no reason why they might want to mail them at undiscounted rates in an attempt to compete with Valassis.

The NSA does not give rise to price discrimination between Valassis and newspapers as the Public Representative suggests. *Id.* Should newspapers now decide that they wish to deliver FSIs through the mail, it would seem that they could qualify as similarly situated to Valassis as they would be bringing new FSI business to

¹⁴ Notice of the United States Postal Service of Filing of Contract and Supporting Data and Request to Add Valassis Direct Mail, Inc. Negotiated Service Agreement to the Market-Dominant Product List, April 30, 2012, Attachment B.

¹⁵ See Comments of the Public Representative in Response to Order No. 1330, May 24, 2012, at 4 (PR Comments).

the Postal Service. Therefore, they could meet the three tests set out by the Postal Service and recognized by the Commission. Order No. 1448 at 34-35.

The Public Representative's arguments interchange analysis between the upstream and downstream markets in his many points. See PR Answer at 2, 6-8. For clarity, the downstream market consists of the distributers of advertising circulars, principally the Postal Service and the newspapers, but additionally including private carriers and door hangers. In the upstream market are the aggregators of durable goods retail advertisements, including Valassis and the newspapers. Newspapers participate in both the upstream and the downstream market.

The Postal Service, by offering a discount to Valassis and potentially to other similarly situated mailers, is competing fairly with newspapers in the downstream market for the distribution of FSIs. Indeed, the Public Representative recognizes that newspapers are pre-eminent in this market, which currently provides newspapers with significant profit. *Id.* at 2, 7. It is the nature of competition that when one firm makes significant profits, existing or new competitors will try to obtain some of that business, often by offering new lower prices. This is not anti-competitive behavior. The Public Representative asserts that because of this price competition, "local and regional newspapers...will drop like flies," without drawing any connection between the discount offered to Valassis in limited geographic markets and local and regional newspapers. *Id.* at 2. How much new business Valassis will attract, if any, will only be known after retailers evaluate and balance the effectiveness of advertising distributed via Valassis and newspapers, and the associated price difference.

The Public Representative asserts that only "behavioral" antitrust safeguards, rather than "structural" antitrust safeguards, are relevant to the NSA agreement. *Id.* at 5. By "behavioral" safeguards, the Public Representative isolates potential future anticompetitive behavior that might cause damage. In this case, the Public Representative directly references the loss to retailers (consumers) seeking to distribute their advertisements if a newspaper goes out of business, potentially leaving fewer

choices for retailers. This speculative future loss would not negate the immediate increased welfare that consumers will experience due to the lower prices afforded by the price competition in the downstream market that result from the NSA.

The Public Representative asserts that the "most important failing of the Commission's analysis" is the purported conclusion that price discrimination is fair competition as long as prices are above marginal costs. *Id.* The Public Representative completely ignores the requirement that NSAs be available to similarly situated mailers on reasonable terms. Price discrimination would be of concern only in a situation in which other similarly situated mailers are precluded from receiving a functionally equivalent NSA. There is no evidence that such a situation exists in this instance.

The Public Representative references additional testimony of Dr. Panzar in hopes of supporting his point. *Id.* at 6. However, the point Dr. Panzar makes assumes that similarly situated mailers in the downstream market, so called "competitors of the favored user," cannot avail themselves of the discount. In other words, if similarly situated mailers are not able to access the NSA discounts. This has not been shown to be true in this case. Thus, Commission cannot conclude that the similarly situated mailer safeguard imposed by § U.S.C. 3622(c)(10) will fail.

Finally, the Public Representative asserts that the Commission's "relevant market" definition is too broad. *Id.* at 7. He suggests that relevant market is the weekend delivery of FSI packets inside newspapers. *Id.* This market is different than that suggested by the Public Representative on the record in this docket, and is too narrow to satisfy the hypothetical monopolist test used as a guideline by the Commission. See Order No. 1448 at 24-26.

It is ordered:

The Newspaper Association of America Motion for Stay, filed August 24, 2012, is denied.

By the Commission.

Shoshana M. Grove Secretary

CONCURRING OPINION OF COMMISSIONER HAMMOND

While the Negotiated Service Agreement between Valassis and the U.S. Postal Service met the other requirements for approval, too much evidence was presented to the Commission by the many opponents of this NSA for me to conclude that it would not cause unreasonable harm to the marketplace. By law, that is a major factor the Postal Regulatory Commission must consider.

Although I opposed the NSA, I am joining in approval of this Order because the Newspaper Association of America has not met the burden of proof justifying a stay of a final Commission Order.